



NATIONAL ROAD TRANSPORT ASSOCIATION

Submission to the National Transport Commission

Issues Paper: Assurance models

24 October 2019

Introduction

1. The National Road Transport Association (NatRoad) is pleased to make comments on the Issues Paper entitled *Assurance Models*¹ released by the National Transport Commission (NTC) on 28 August 2019. The Issues Paper is part of a series that informs the current review of the Heavy Vehicle National Law (HVNL).²
2. NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tippers, car carriers, as well as tankers and refrigerated freight operators.
3. This submission responds to the questions posed in the Issues Paper.

Question 1: Have we covered the issues relating to assurance accurately and comprehensively? If not, what do we need to know?

4. Yes, the Issues Paper is comprehensive. But, as a qualifier, NatRoad has received feedback from members that the shape of assurance schemes must fit with the new HVNL. This means that until the substantive law is settled, the design of an assurance scheme should be delayed. This is particularly the case if assurance no longer leads to regulatory concessions being available. That is highly likely given that such a scheme would contradict the move to performance-based standards which has underlined the other work done by the NTC in the current review process. This proposition is expressed in draft regulatory principle 3 in the Issues Paper.³
5. In addition, in the Issues Paper the NTC indicates that there is low confidence in the systems of assurance.⁴ We agree.
6. In the face of increasing customer and principal audits despite membership of one or even more certification schemes, members are indicating that they are suffering under an administrative tidal wave. Customers/principals do not appear to have sufficient confidence in current assurance schemes so as to have the confidence to rely on them to satisfy their chain of responsibility obligations. Members have provided feedback that unless this issue is able to be resolved then assurance schemes will add to this administrative burden without necessarily delivering additional benefits. This feedback colours our approach to the subject area.
7. Members are reporting that not only are they subject to frequent and intrusive audits but that they are required to adhere to sometimes unreasonable operational directives (see box over page) linked to compliance with the private assurance regimes being imposed. There is an absurd level of duplication where the member has its own audit system, is then audited by its major customer and then, for example, in seeking to meet a tender, must meet other intrusive

¹ <https://www.ntc.gov.au/sites/default/files/assets/files/NTC%20Issues%20Paper%20-%20Assurance%20models.pdf>

² <https://www.ntc.gov.au/heavy-vehicles/safety/review-of-the-heavy-vehicle-national-law/>

³ Above note 1 at p34

⁴ Above note 1 at p32

requirements. The major customer or principal (where the member is a subcontractor) then places other contractual obligations on the member (see box) in the name of assurance.

8. This matter is summarised in the Issues Paper in short form as follows with the assertion that government lack of confidence is the factor in operation. We note that there is insufficient research to substantiate the proposition in the Issues Paper, but we repeat it here for the record. There is an absence of appropriate, objective research about the cost of and extent of the customer/principal audits and the following statement needs greater substantiation:

There is evidence that a lack of government and regulator confidence in certified operators' capacity to manage risks translates to a comparable lack of commercial confidence.⁵

Example of imposition of larger clients into members' businesses

Large clients are imposing their systems on contractors regardless of the contractors already having their own systems satisfying their legal obligations, contractor size, the cost impact, or privacy concerns:

- A large road transport business (the principal) has advised its contractors that it is introducing a new app based system that will not only allocate delivery jobs but be used to monitor the location of the contractor's trucks even when they are not performing work for the principal.
- The app must be loaded onto a smartphone used by the professional drivers of the trucks performing the work.
- The contractors do not provide smart phones to their employees. Where a phone is not provided, drivers use their own phone – sometimes a smart phone, sometimes not.
- The contractors already have systems to ensure they comply with their safety obligations, including GPS monitoring devices in their trucks to keep track of their location and cross check that their drivers comply with the fatigue management requirements. This GPS data is not automatically available to the principal.
- The concerns include the requirement for a driver to have a smart phone, to use that smart phone for purposes prescribed by their employer's client (the principal) without the principal seeking consent or offering to cover purchase or operating costs, and the smart phone will be trackable not just when they are performing deliveries for their employer's client but when they are undertaking other driving work and possibly not even during work time.

9. The viewpoint held by many members is that formal assurance schemes are: not stopping a multiplicity of customer/principal audits; are not required, are flawed, expensive, ineffectual, wasteful, and are not linked to promoting safety outcomes.

⁵ Ibid

10. Members will generally accept the constraints and benefits of an assurance scheme but balk at compliance with a plethora of so-called schemes. Members are also suspicious that any mandated scheme could become operator licensing under another guise.

Question 2: Is there evidence of third parties, such as site managers, customers or loaders, performing audits on heavy vehicle operators that duplicate certification audits? Can third parties be assured (by an accreditor or certifier, within the HVNL, or some other means) that their audits are unnecessary?

11. The audits just discussed not only duplicate but build on current formal assurance schemes to closely affect the manner of operation of many members, as the above boxed example shows.
12. The main area of complaint that NatRoad has fielded from members is via their role as subcontractors. This is because NatRoad membership reflects the characteristics of the road transport industry. Subcontracting plays an important role within the hire and reward fleet. Many of these subcontractors are owner-operators with no employees. Less than 0.5% of all operators own a fleet of more than 100 trucks, and 70% have just one truck in their fleet.⁶
13. Under chain of responsibility law, executive officers must exercise 'due diligence' to ensure parties in the chain of responsibility comply with their obligations under the HVNL. They are advised by NatRoad and others to conduct a wide ranging appraisal of business systems and activities to establish how and how well the company's systems ensure the safe transportation of goods,⁷ as well as ensuring there is a feedback loop about safety issues and corrective actions that have been taken.
14. The subcontractor audits that are undertaken appear to have derived from this obligation. But the audits that we receive complaints about, as shown in the above box, often exceed the COR requirements – this is further illustrated in the box below.

Example

Large clients imposing requirements on their contractors from which they potentially make a direct commercial gain.

A large road transport business instructed its contractors their drivers must have particular training and proof of the fact that the training was undertaken. The contractors were offered the training through the client's training provider for a fee, although theoretically able to obtain that training from elsewhere.

⁶ See Deloitte report prepared for ATA for this review

<http://www.truck.net.au/sites/default/files/submissions/DAE%20Economic%20benefits%20of%20improved%20regulation%20in%20the%20Australian%20trucking%20industry%20March%202019%20Final.pdf>

p 13

⁷ See the NHVR fact sheet <https://www.nhvr.gov.au/files/201705-0520-cor-executive-officers.pdf>

15. The Issues Paper indicates that in a revised HVNL an explicit provision in law that connects an assurance framework to chain of responsibility provisions may be possible.⁸ The Issues Paper states that an example could be providing in law that a consignor who contracts an operator doesn't satisfy the primary duty simply by auditing the operator for matters they are already assured for. This is unsatisfactory: "already assured for" places obvious limits around the boundaries of an audit and would likely be easily overcome.
16. This is clearly a matter for the market and the way that the future HVNL will be shaped. But it is also about improving or even introducing a safety culture. Hence the NatRoad emphasis throughout this review on better unfair contract terms legislation and the introduction of better means of enforcing the legislation. These reforms would improve the industry's safety culture.
17. As we have expressed in other submissions in this review, greater fairness in the industry can be brought about by the federal Government acting to introduce a mandatory code for the industry under Part IVB of the *Competition and Consumer Act 2010 (Cth)* (CCA) which would address harsh payment terms in transport industry contracts inclusive of a "pay when paid" prohibition and a maximum 30 day payment provision. This code could also deal with unethical use of company audits e.g. where they obtain a commercial advantage as expressed in the second boxed example. Constraints on extensive audits that invaded privacy considerations could also be built into the Code. These measures would likely decrease the number of audits conducted.

Question 3: Does the HVNL need an assurance scheme? Could the flexibility operators want be achieved simply through performance standards, or are some operators and operations sophisticated or specialised enough to need alternative compliance options? Does technology or vehicles or any other operational area need assurance under the HVNL?

18. Most of NatRoad's policies on accreditation arose from the Board's consideration of the Medlock review which analysed heavy vehicle accreditation.⁹
19. In the context of current HVNL provisions, NatRoad supports a number of the Medlock recommendations, in particular:
 - Developing a single national accreditation framework to improve consistency across schemes and allow mutual recognition; and
 - Applying a safety management system approach to accreditation, with sufficient flexibility for operators to adapt requirements to suit the nature of their operations.

⁸ Above note 1 at p35

⁹ <https://www.nhvr.gov.au/files/201812-0966-analysis-of-hv-safety-accreditation-schemes-in-aus.pdf>

20. The Medlock recommendation to ultimately establish mandatory accreditation requirements is more controversial. But as a long-term goal, it may have merit.
21. NatRoad members report that appropriate training standards and barriers to entry of untrained operatives entering the industry are not in place. These developments are producing two undesirable outcomes. First, unskilled unsafe 'operators' are hindering the industry's drive towards increased safety objectives and public respect. Secondly, ease of entry is allowing an oversupply of unskilled operators who are not adept at proper costing. This factor is lowering revenue levels to below sustainability for many skilled and compliant operators, particularly those who balk at accepting unfair contract terms discussed above and in other submissions to the review.
22. Mandatory accreditation on industry entry could assist to solve the problems set out in the prior paragraph. But the concern with mandatory accreditation is where costs of achieving the accreditation becomes an excessive burden on the industry. In the words expressed by one NatRoad Board member: "The danger is that 'Mandatory Accreditation' could become a 'License Fee' with no improvement in skills or competence."

Question 4: Which of the models do you prefer? What should they assure and why? Do you have an alternative model? Who should perform the key roles in an HVNL assurance scheme?

23. A move to primary duties and less prescriptive regulations as a result of the review of the HVNL makes accreditation as an alternative compliance mechanism less attractive. It is therefore necessary to review the role of accreditation under a new legislative framework and the benefits the schemes provide to operators to ensure their viability. Operators are unlikely to join an accreditation scheme if the costs are not offset by clear safety and productivity benefits, including through regulatory incentives and reduced on-road enforcement of accredited operators.
24. NatRoad supports a single national provider.

Question 5: Fully developing a new assurance scheme could take a long time, even if writing it into law is relatively simple. What can we use from what we have, and how can we transition to the desired end-state?

25. The starting point would be to improve the current system by introducing the recommendations from the Medlock review that NatRoad has supported as sensible reforms as set out in paragraph 19.
26. Otherwise timing is not an issue: getting the scheme right is far more important than expedition.